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IN THE SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

October Term, 1981

No. 80-6155

EARL LLOYD JACKSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Whether the 1977 California death penalty legislation, under which petitioner was sentenced, violates the Eighth and Fourteenth Amendment prohibition against cruel and unusual punishment?

2. Whether petitioner was denied the right to effective assistance of counsel at the penalty phase of his trial?

* * * * * *

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INTRODUCTION

Respondent, State of California, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari in which petitioner seeks review of the judgment of the Supreme Court of the State of California entered on October 23, 1980, affirming the judgment of conviction and sentence of death.

* * * * * *

A —

OPINIONS BELOW

On October 23, 1980, the California Supreme Court affirmed the judgment opposing the death penalty following a conviction of two counts of first degree and two counts of burglary in People v. Jackson, 28 Cal.3d 264, 168 Cal.Rptr. 603, 618 P.2d 149 (1980). Said opinion is attached as Exhibit A to the Petition for Writ of Certiorari.

On December 10, 1980, the California Supreme Court denied petitioner's Petition for Rehearing which denial is attached as Exhibit B to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes jurisdiction of this Honorable Court under Title 28, U.S.C. § 1254 and Rule 17 of the Rules of the Supreme Court. (Petn., p. 2.) (Since petitioner is seeking a Writ of Certiorari and not appeal, it would appear that the correct jurisdictional citation would be Title 28, U.S.C. § 1257(3).)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions relied upon by petitioner are set out at pages 2 through 8 of the Petition. Respondent also relies upon;

Article VI, section 11 of the Constitution of California:

> "The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute.
>
> "Superior courts have appellate

jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties.

"The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right."

Former California Penal Code section 190:

"Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in state prison for life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for five, six, or seven years."

Former California Penal Code section 190.1:

"A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

"(a) The defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2, except for a special circumstance charged pursuant to paragraph (5) of subdivision

(c) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree.

"(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

"(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4."

Former California Penal Code section 190.4:

"(a) Whenever special circumstances as enumerated in Section 190.2 are alleged

and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to subdivision (b) of Section 190.1.

"In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

"If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

"If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of the separate penalty hearing.

"In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss

the jury and impose a punishment of confinement in state prison for life.

"(b) If defendant was convicted by the court sitting without a jury, the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

"If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole.

"(c) If the trier of fact which convicted the defendant of a crime for which he may be subjected to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them

to be entered into the minutes.

"(d) In any case in which the defendant may be subjected to the death penalty, evidence presented at any prior phase of the trial, including any proceeding upon a plea of not guilty by reason of insanity pursuant to Section 1026, shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

"(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision (7) of Section 1181. In ruling on the application the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make an independent determination as to whether the weight of the evidence supports the jury's findings and verdicts. He shall state on the record the reason for his findings.

"The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes.

"The denial of the modification of a death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the people's appeal pursuant to paragraph (6) of subdivision (a) of Section 1238.

"The proceedings provided for in this subdivision are in addition to any other proceedings on a defendant's application for a new trial."

Former California Penal Code section 190.5:

"(a) Nothwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 years at the time of commission of the crime. The burden of proof as to the age of each person shall be upon the defendant.

"(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of subdivision (a) of Section 1672 of the Military and Veterans Code, or Sections 37, 128, 4500, or subdivision (b) of Section 190.2 of this code, the death penalty shall not be imposed upon any person who was a principal

in the commission of a capital offense, unless he was personally present during the commission of the act or acts causing death, and intentionally physically aided or committed such act or acts causing death.

"(c) For the purposes of subdivision (b), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim."

California Penal Code section 1181, subdivision 7:

"When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed . . . ."

California Penal Code section 1239:

"(a) Where an appeal lies on behalf of the defendant or the people, it may be taken by the defendant or his counsel, or

by counsel for the people, in the manner provided in rules adopted by the Judicial Council.

"(b) When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel."

STATEMENT OF THE CASE

The facts relating to the within case are set out in the opinion of the Supreme Court of the State of California (People v. Jackson, supra, 28 Cal.3d 264, 282-285, 168 Cal.Rptr. 603, 609-610, 618 P.2d 149, 155-156) as follows:

"In october 1977, defendant was charged with the murders of Gladys Ott and Vernita Curtis. By a subsequent amended information, he was charged additionally with burglary of the residences of these two victims. As special circumstances authorizing imposition of the death penalty under the 1977 law applicable to this case (former Pen. Code, § 190 et seq.; all further statutory references are to that code unless otherwise cited), the amended information further alleged that (1) the Ott murder was wilful, deliberate and premeditated and was committed during the course of a burglary (id., § 190.2, subd. (c)(3)(v)), and (2) defendant committed an additional act of first degree murder by killing Mrs. Curtis (id., subd. (c)(5)).

"Initially a public defender was

appointed to represent defendant who then pleaded not guilty and denied the special circumstances allegation. Thereafter, the public defender's office declared that there existed a conflict of interest and Attorney Veganes was appointed to represent defendant. Numerous pretrial motions were made on defendant's behalf by Mr. Veganes, and denied by the court, including motions to: (1) suppress defendant's tape-recorded statement to police officers; (2) limit voir dire examination regarding the prospective jurors' beliefs concerning the death penalty; (3) conduct the voir dire examination of individual prospective jurors outside the presence of the other veniremen; (4) exclude the public audience during voir dire; (5) appoint an additional counsel to assist during the penalty phase; (6) permit a separate jury panel for the guilt and penalty phases; (7) disclose the prosecutor's 'jury book,' and (8) exclude as unduly prejudicial certain photographs of the victims.

"Voir dire examination of the prospective jurors commenced on December 8, 1978, and was concluded on December 19. The guilt phase of the trial thereupon commenced and continued to January 8, 1979. Although defense counsel cross-examined

prosecution witnesses extensively and presented a lengthy closing argument, he offered no affirmative evidence on defendant's behalf and defendant did not take the stand. The jury found defendant guilty of two counts of first degree murder and two counts of burglary in the first degree, as charged. The jury also found to be true both of the special circumstances which were alleged in the information.

"The penalty phase commenced on January 9. The People called two witnesses and rested; defendant presented no mitigating evidence. Following extended arguments by opposing counsel, the jury was instructed and commenced deliberations. On January 12, the jury fixed the penalty at death. Following denial of his motions for new trial, for arrest of judgment, and for modification of the verdict, defendant was sentenced to death of the Ott murder and to state prison as prescribed by law for the Curtis murder and the burglaries. The present appeal is automatic. (§ 1239.)

"We summarize the factual background underlying defendant's offenses as gleaned from the trial record: On August 29, 1977, her neighbors found Vernita Curtis, an 81-year-old widow, lying unconscious on the bedroom floor of her apartment in Long Beach. Her television set, toaster and

other items were missing. Mrs. Curtis lived alone. Paramedics called to the scene observed that she bore severe facial bruises and swelling, and subsequent examination disclosed multiple injuries to her head, neck and chest. After four days of hospitalization Mrs. Curtis died of her injuries.

"A neighbor lady, Ilena Gaines, testified at trial that while Mrs. Curtis was being removed on a stretcher from the Curtis apartment, defendant, an acquaintance of Gaines, smiled and laughed and stated to Gaines, in the words of the witness, that 'He was the one who did that. He said that he did that.' On cross-examination Gaines further testified that she had been living with Elton Boyd who, in a separate trial, had been convicted of murdering Mrs. Curtis. Other evidence adduced at trial disclosed that Boyd was defendant's accomplice during commission of the Curtis murder.

"The preliminary hearing testimony of another witness, Debria Lewis, was read into the trial record. She described a conversation with defendant on September 11, 1977, during which defendant pointed to a newspaper article reporting the Curtis murder and declared to Lewis, 'This is what I done.' When Lewis asked defendant why he

had so acted, he replied 'If she had just been still--had been still and given him the money, that she would have been walking around today.'

"On September 7, 1977, Toni McDowell discovered the body of her mother, Gladys Ott, a 90-year-old widow, lying on a bed in Mrs. Ott's apartment which was directly across a hallway from the lower floor apartment of Mrs. Curtis who was both a friend and neighbor of Mrs. Ott. According to the witness McDowell, the Ott apartment was a 'shambles' and a television set and toaster were missing. Mrs. Ott's face was badly bruised and she appeared to have been beaten to death. An autopsy disclosed numerous injuries, including massive facial and neck bruises, fractured ribs, and an extensive vaginal laceration apparently caused by insertion of a foreign object. Defendant's fingerprints were found on a closet doorjamb and on other objects in Mrs. Ott's apartment. According to the witness Lewis, defendant in his September 11, 1977, conversation with her described both ladies, Mrs. Curtis and Mrs. Ott, as 'two old bags [who] were a nuisance and . . . got what they deserved.'

"A further witness, Debra Hall, defendant's cousin, testified that defendant, in referring to a news article

concerning both the Curtis and Ott murders, acknowledged 'This is what I did, that it was because I needed some money.'

"On learning that the police were seeking him, defendant surrendered to the officers and agreed to make a tape-recorded statement. In this statement, after initially denying any participation in the crimes, defendant ultimately admitted that he and others had burglarized both the Ott and Curtis apartments. Defendant also admitted that during these burglaries he hit Mrs. Ott once and held Mrs. Curtis while his accomplices were striking her.

"Defendant's cellmates in the county jail, Mark Mikles and Ronald McFarland, testified at trial that defendant had admitted to them that he had killed both women. According to these witnesses, defendant boasted that he had repeatedly struck Mrs. Ott in the face, and had used a wine bottle to attack Mrs. Ott sexually.

"At the penalty phase of the trial the prosecution introduced evidence regarding the aggravated nature of the Ott slaying, including further evidence confirming defendant's sexual mistreatment of Mrs. Ott during the burglary. Defendant's counsel cross-examined prosecution witnesses and made a lengthy closing argument but declined to introduce any evidence on

defendant's own behalf."

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari in the case should be denied. Under recent United State Supreme Court decisions interpreting the constitutionality of various death penalty statutes, the capital punishment legislation under which petitioner was sentenced complies with federal constitutional standards. Furthermore, petitioner was afforded competent counsel who made sound tactical decisions in defending his client.

ARGUMENT

I

THE CALIFORNIA DEATH PENALTY STATUTES UNDER WHICH PETITIONER WAS SENTENCED ARE CONSTITUTIONAL

Petitioner urges that the California 1977 capital punishment legislation under which petitioner was sentenced is unconstitutional in violation of federal standards. (Petn., p. 9.) It should be noted in this regard that the California Supreme Court three times has upheld the constitutionality of the 1977 legislation under which petitioner was sentenced in People v. Harris, ____Cal.3d____, ____Cal.Rptr.____, ____P.2d____ (filed February 11, 1981); People v. Frierson, 25 Cal.3d 142, 158 Cal.Rptr. 281, 599 P.2d 587 (1979); and the within case of People v. Jackson, supra, 28 Cal.3d 264, 158 Cal.Rptr. 603, 618 P.2d 149 (1980).

Furthermore, as petitioner points out, subsequent to the commission of the crimes of which petitioner was convicted, the People by initiative broadened the basis upon which the death penalty could be rendered and furthermore, in minor ways, changed certain of the procedures. (Petn., p. 13.) The initiative measure was approved November 7, 1978.

However, since this measure was passed after the commission of the crimes for which petitioner was convicted, its provisions are not relevant herein. As such, all references to capital legislation will be to the 1977 statutes under which petitioner was tried and sentenced.

On July 2, 1976, this Honorable Court rendered a series of significant decisions relative to the death penalty, namely, Gregg v. Georgia (1976) 428 U.S. 153; Proffitt v. Florida (1976) 428 U.S. 242; Jurek v. Texas (1976) 428 U.S. 262; Woodson v. North Carolina (1976) 428 U.S. 280; Roberts v. Louisiana (1976) 428 U.S. 325. These cases upheld the constitutionality of the death penalty as a punishment under federal grounds but a plurality limited the procedures under which the death penalty could be given. In the aforementioned decisions the plurality upheld the death penalty statutes of Georgia, Florida and Texas but struck down the legislation of Louisiana and North Carolina as being mandatory. Under the plurality decisions of the aforementioned opinons, a constitutional death penalty statute would necessitate the existence of (1) narrowly defined aggravating factors or categories of murder for which capital punishment is authorized and (2) the opportunity for the defendant to present evidence and argument on and to have the jury consider mitigating circumstances with respect to both the commission of the offense and his personal characteristics which militate against imposition of the extreme penalty. (Gregg v. Georgia, supra, at p. 199; Proffitt v. Florida, at pp. 252-256; Jurek v. Texas, supra, at p. 271-272.)

Thus under federal standards according to the plurality decisions, capital punishment legislation must ". . . focus on the particularized circumstances of the crime and the defendant." (Gregg v. Georgia, supra, at p. 199.) A fundamental respect for

humanity underlying the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (Woodson v. North Carolina, supra, at p. 304.) The death penalty statutes under which petitioner was tried and convicted comply with the aforementioned federal constitutional standards.

Under the relevant statutes, Penal Code section 190 stated that every person guilty of murder in the first degree shall suffer death, confinement in the state prison for life without possibility of parole, or confinement in the state prison for life to be determined by the procedures set forth in California Penal Code sections 190.1, 190.2, 190.3, 190.4 and 190.5. Under section 190.1(a) of the Penal Code, the defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at that time determine the truth of all special circumstances charged as enumerated in section 190.2, except if a special circumstance relates to the defendant having been convicted of a murder in a prior proceeding.

Under section 190.1(b), if the defendant was found guilty of murder in the first degree and one of the special circumstances charged a prior first or second degree murder conviction, there would be further proceedings on the question of the truth of the special circumstance. Under section 190.1(c), if the defendant was found guilty of first degree murder and one or more of the special circumstances was found to be true and any plea of not guilty by reason of insanity had been tendered, there would be a hearing on that plea.

The special circumstances were listed in section 190.2

of the Penal Code. That section related that the penalty for a defendant found guilty of murder in the first degree will be death or confinement in the state prison for life without the possibility of parole in cases in which one or more of the special circumstances that had been charged were found to be true. These would include the specifically defined circumstances which were found true in this case, namely, first degree murder in which there was a willful, deliberate, and premeditated murder in the course of a burglary (Pen. Code, § 190.2, subdivision (c)(3)(v)), and the conviction of first degree murder wherein it was found the defendant committed an additional act of murder (Pen. Code, § 190.2, subdivision (c)(5)). The death penalty legislation provided for a bifurcated hearing. If, in fact, the defendant was found guilty of first degree murder and one or more of the special circumstances alleged was found to have been true, there would be a penalty phase of the trial. Section 190.3 of the Penal Code set forth the procedures for the penalty phase of the trial. If the defendant was found guilty of murder in the first degree and the special circumstances charged were found to be true, the trier of fact would determine whether the penalty should be death or life imprisonment without the possibility of parole.

At these proceedings on the issue of penalty, evidence could be presented by both the People and the defendant as to any matter relevant to aggravation, mitigation and sentence including but not limited to the nature and circumstances of the offense for which he was convicted, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental and physical

condition. Specifically excluded was evidence regarding other criminal activity which did not involve the use or attempted use of force or violence, or the expressed or implied threat to use force or violence. The criminal activity to be admissible under the relevant legislation did not require a conviction but in no event was evidence of prior criminal activity to be admitted for an offense for which the defendant was prosecuted and acquitted.

Furthermore, except for the proof of the special circumstance which could subject a defendant to the death penalty, no evidence could be presented by the prosecution in aggravation unless notice of the evidence to be introduced had been given to the defendant within a reasonable period of time.

Under section 190.3 at the proceedings on the question of penalty, evidence could be presented on the following factors: (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true; (b) The presence or absence of any criminal activity by the defendant which involved the use or attempted use of force or violence with an expressed or implied threat to use force or violence; (c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; (d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act; (e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct; (f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person; (g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was

impaired as a result of mental disease or the effects of intoxication; (h) The age of the defendant at the time of the crime; (i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor; (j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime. After having heard and received all of the evidence, the trier of fact must consider and take into account and be guided by the aggravating and mitigating circumstances aforementioned, and to determine whether the penalty shall be death or life imprisonment without the possibility of parole.

Section 190.4 of the Penal Code provided for the various procedures that are to be applied in capital cases. Under section 190.4(a), whenever special circumstances were alleged and the trier of fact found the defendant guilty of first degree murder, the trier of fact also had to make a special finding on the truth of each alleged special circumstance. In the case of reasonable doubt as to whether a special circumstance was true, the defendant was entitled to a finding that it was not true.

Section 190.4(d) provided that in any case in which the defendant may be subjected to the death penalty, evidence presented at any prior phase of the trial, including any proceeding upon a plea of not guilty by reason of insanity should be considered at any subsequent phase of the trial, if the trier of fact of the prior phase was the same trier of fact in the later phase.

Under section 190.4(e), it was stated that in every case in which the trier of fact had returned a verdict or a finding imposing the death penalty, the defendant should be deemed to have made an application for modification of such verdict or

finding pursuant to subdivision (7) of section 1181. In ruling on the application, the trial judge should review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in section 190.3, and should have made an independent determination as to whether the weight of the evidence supported the jury's findings and verdicts. The judge had to state in the record the reasons for his findings. The judge furthermore was required to set forth the reasons for his ruling on the application and direct they be entered on the Clerk's minutes. The denial of the modification of a death penalty verdict pursuant to subdivision (7) of section 1181 would be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of section 1239. Those proceedings provided for are to be in addition to any other proceedings on a defendant's application for a new trial.

California Penal Code section 1239 provides for an automatic appeal on all capital cases. Article VI, section 11, of the California Constitution gives the California Supreme Court jurisdiction over cases in which the death penalty has been rendered. Thus it can be said with certainty that the death penalty statutes under which petitioner was sentenced stem from the United States Supreme Court decisions and are in full compliance with their mandates.

Petitioner urges that the death penalty legislation under which he was sentenced is unconstitutional because there is no requirement that the aggravating factors outweigh the mitigating factors for the sentence of death to be imposed. (Petn., p. 11.) However, petitioner misconceives the legislation under which he was sentenced.

Before a death penalty sentence can be imposed, the trier of fact must first find the truth or falsity of the special

circumstance or special circumstances beyond a reasonable doubt. In the case of a reasonable doubt under section 190.4 of the Penal Code, as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. Therefore, the jury has to find beyond a reasonable doubt that a special circumstance is true before the death penalty can even come into play. It is only after a finding that a special circumstance is true, that a jury would consider the aggravating and mitigating circumstances set forth in Penal Code section 190.3 at the penalty phase.

Thus, California's legislation is something like that which was upheld by this Court in Gregg v. Georgia, supra, 428 U.S. 153, 196-198. Under the Georgia legislation, there was a narrowing of the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which had to be found by the jury to exist beyond a reasonable doubt before a death sentence could ever be imposed. Upon a positive finding by the jury, they would then consider other listed mitigating or aggravating circumstances which might be supported by the evidence. (Gregg v. Georgia, supra, at pp. 196-197.)

In the same manner in the California legislation the classes of murder were limited by the finding of the truth or falsity of a special circumstance beyond a reasonable doubt. Once that finding was made, then at the penalty phase, the jury could consider other listed aggravating and mitigating factors. Nothing in the Georgia legislation was mentioned relative to a burden of proof as to these other aggravating or mitigating circumstances. As such, the California legislation in this respect mirrors that which was upheld in Georgia by the plurality in Gregg. (See also People v.

Frierson, supra, 25 Cal.3d 142, 176, 158 Cal.Rptr. 281, 300-301, 599 P.2d 587, 606-607.)[1/]

Petitioner also urges that the statutes are unconstitutional under which he was convicted and sentenced because it should be constitutionally required that aggravating factors must be found true beyond a reasonable doubt. (Petn., p. 14.)

However, it does not seem that the burden of proof or the finding of any circumstance, whether aggravating or mitigating beyond a reasonable doubt, is necessitated for a constitutional death penalty statute. In Proffitt v. Florida, supra, 428 U.S. 242, 248-249, the jury was advisory to the trial court in determining whether the mitigating circumstances

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1. Petitioner alleges that because California, by the 1978 initiative, changed its procedures so that aggravating circumstances had to outweigh mitigating circumstances for a death penalty to be rendered and because in a voter's pamphlet, one of the supporters of the new legislation stated that the "old law" did not meet this requirement and "might" be declared unconstitutional, that in fact the legislation under which he was sentenced is unconstitutional. (Petn. pp. 13-14.) It is urged, however, that the enactment of the initiative by the people which in effect broadened the death penalty was one mirroring voter preference and not any symbol of constitutional mandate. But, rather, the statutes upheld in Georgia in Gregg prove to the contrary that no requirement exists that aggravating circumstances must outweigh mitigating circumstances relative to a finding of death if in fact a special circumstance limiting and narrowing the crime of murder is found to be true beyond a reasonable doubt.

outweighed the aggravating circumstances. However, no burden of proof was necessary in the Proffitt case. Again, it should be noted that in order for the death penalty procedures to come into play, a special circumstance must be found to be true beyond a reasonable doubt under Penal Code section 190.4. Thus, as in Georgia, once the sentencing body finds a special circumstance true beyond a reasonable doubt, then it may constitutionally consider other mitigating and aggravating factors absent any burden of proof. (See People v. Frierson, supra, 25 Cal.3d 142, 180, 158 Cal.Rptr. 281, 302-303, 599 P.2d 587, 608-609.)

Petitioner's further allegation that a requirement of an unanimous verdict in finding aggravating factors is necessary, is nontenable. (Petn., p. 16.) Again, as has been said before, a special circumstance has to be found true beyond a reasonable doubt by an unanimous jury (or judge if jury is waived) before a death penalty can be considered in the penalty phase.

Again, California's legislation is similar to that upheld in Georgia in this regard. Note also, the Florida statute which was upheld wherein the advisory jury's verdict merely had to be by a majority vote before the actual decision is made by the trial judge on the issue of life or death. (Proffitt v. Florida, supra, at pp. 248-249.)

Petitioner also alleges that in order for a death penalty statute to be constitutional, written findings are required. (Petn., p. 16.) It is urged that no such requirement is mandated under the Federal Constitution.

Additionally, however, section 190.4(a) required that a jury must make a specific finding relative to the truth or falsity of the special circumstance, the truth of which must be found before the penalty phase begins. Secondly, in every case in which the trier of fact imposed the death penalty, the

defendant is deemed to have made an application for modification of the verdict under section 190.4(e) and section 1181, subdivision (7) of the California Penal Code. In ruling on the application, the judge must state on the record the reason for his findings and furthermore, should set forth the reasons for his ruling on the application and direct they be entered on the Clerk's minutes by reason of the aforementioned statutes.

Thus, it is urged that Gregg and its progeny imposed no rigid standards regarding the necessity of findings and further, the California system did in fact provide for written findings relative to the finding of the truth of the special circumstances and the trial court's ruling upon an automatic motion for modification. (See People v. Jackson, supra, 28 Cal.3d 264, 316-317, 168 Cal.Rptr. 603, 630, 618 P. 2d 149, 175-176; People v. Frierson, supra, 25 Cal.3d 142, 178-179, 158 Cal.Rptr. 281, 302, 599 P.2d 587, 608-609.)

Petitioner finally alleges that the death penalty legislation under which he was convicted is unconstitutional because it fails to provide for proportionality review. (Petn., p. 18.) However, it is urged, that the appellate guidelines in California for review are more than adequate.

First of all, a criminal defendant has an automatic appeal in a capital case with the California Supreme Court. (Cal. Const., art. VI, § 11; Cal. Pen. Code, § 1239.) It is urged, that all that is necessary for a constitutional death penalty statute is that said legislation have narrowly defined aggravating factors or categories of murder for which capital punishment is authorized and there would.be an opportunity for the defendant to present evidence and argument on and to have the jury consider the mitigating circumstances with respect to both the commission of the offense and its personal characteristics

which militate against the imposition of the death penalty.

Unfortunately, therefore, petitioner arbitrarily picks and chooses the disparate aspects of various United States Supreme Court decisions in an attempt to support his position, which is not tenable. He neglects to fully analyze the discussion of appellate review in various states in which the death penalty was upheld. For example, in Jurek v. Texas, 428 U.S. 262, 276, the appellate function is barely mentioned except for the fact that there is "prompt judicial review of the jury's decision in a court with statewide jurisdiction." The fact that appellate review in Texas is not delineated in any detail shows that the constitutional requirement for this review is either minimal or nonexistent.

Furthermore, in Proffitt v. Florida, supra, 428 U.S. 242, 251, 258-259, the court noted that the Supreme Court of Florida, although there were no express requirements for proportionality review in any statutory form, had considered its function to provide for proportionality review. In the same manner, the California Supreme Court in the within case has also stated that it is prepared to afford whatever kind of proportionality review that may be held constitutionally mandated by the high court. (See People v. Jackson, supra, 28 Cal.3d 264, 317, 318-319, 168 Cal.Rptr. 603, 631-632, 618 P.2d 149, 177-178; note also People v. Frierson, supra, 25 Cal.3d 142, 180-184, 158 Cal.Rptr. 281, 303-306, 599 P.2d 587, 610-612.)

As such, the California Supreme Court has placed upon itself the same duty which the supreme court of Florida had placed upon itself. Therefore, the lack of any express statutory requirement for proportionality in appellate review does not in and of itself invalidate the constitutionality of capital punishment legislation. It is urged, that the capital punishment

legislation under which petitioner was tried and sentenced focuses closely on the facts of the crime of murder and additionally allows the sentencing body to consider mitigating circumstances with respect to both the commission of the offense and the personal characteristics of a criminal defendant which would militate against the imposition of the sentence of death.

Therefore, it is submitted that there was complete compliance with the standards set forth by the decisions of this Court relative to the correct standards mandated for a constitutional death penalty legislation.[2/]

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2. In People v. Frierson, supra, a plurality of three justices upheld the constitutionality of the relevant death penalty statutes on both federal and state grounds using as a basis of analysis the decisions of this Honorable Court in Gregg and its progeny. Two other justices concurred, upholding the death penalty statutes under state grounds and presumptively constitutional on federal grounds. (People v. Frierson, supra, 25 Cal.3d 142, 188, 158 Cal.Rptr. 281, 308, 599 P.2d 587, 614, 615.) (The California Supreme Court consists of seven justices.)

In People v. Jackson, supra, the within case, the same plurality upheld the statutes in question on federal grounds reaffirming its prior opinion in Frierson. (People v. Jackson, supra, 28 Cal.3d 264, at pp. 315-317, 168 Cal.Rptr. at pp. 629-631, 618 P. 2d at pp. 175-177.) In Jackson, one of the other justices concurred noting in pertinent part:

> "How much should we demand of the individuals who draft death-penalty statutes? A reasonable and conscientious response to the United States Supreme Court rulings is enough, I think. Since I am

II

PETITIONER WAS NOT DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

Petitioner urges that his trial counsel was incompetent because he did not present any evidence of mitigation in the penalty phase. (Petn., pp. 23-25.) It is urged that petitioner's trial counsel's actions were based upon sound, tactical decisions and as such were well within the range of competence demanded by attorneys in criminal cases. (Tollett v. Henderson, 411 U.S. 258, 267; Parker v. North Carolina, 397 U.S. 796, 797-798; McMann v. Richardson, 397 U.S. 759, 771.)

As stated by the California Supreme Court majority in the Jackson decision, in pertinent part:

> ". . . . Defendant's primary contention regarding trial counsel's inadequacy at the penalty phase is that counsel failed to present any mitigating evidence which might have led the jury to conclude that the death penalty should not be imposed. . . . As explained below, trial counsel argued at length in an attempt to persuade the jury to render a more lenient verdict, making frequent references to the evidence adduced during the guilt phase and to possibly mitigating factors such as defendant's age and his cooperation

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> persuaded that the California Legislature did so respond, I vote to uphold the statute. . . ." (People v. Jackson, supra, at p. 318, 168 Cal.Rptr. at p. 631, 618 P. 2d at p. 177 [Newman, J., Concurring].)

with the police. Under the circumstances, we find no basis for concluding that trial counsel afforded defendant inadequate representation at the penalty phase." (People v. Jackson, supra, 28 Cal.3d at p. 293, 168 Cal.Rptr. at p. 616, 618 P. 2d at p. 162.)

As pointed out by the majority opinion in the California Supreme Court: (1) petitioner has pointed to no witnesses who might have offered mitigating testimony; (2) the only possible witness was petitioner's grandmother who was 90 years old and who was deemed to be, in the tactical decision of trial counsel, "senile;" (3) trial counsel presented to the penalty jury a closing argument based primarily upon petitioner's age, his cooperation with the police, the value of human life, the responsibility of a "capitalistic society" for creating persons such as petitioner and the need for the exercise of mercy in order to alleviate both social and racial tensions; (4) trial counsel took reasonable additional measures such as cross-examination of prosecution witnesses, objection to prosecution evidence and submission of favorable instructions; (4) trial counsel in following the jury's verdict continued his defense efforts in filing motions for new trial, for arrest of judgment, and for modification of verdict, based on a wide variety of grounds; (6) trial counsel had had 13 years prior experience in the practice of criminal law, including murder trial participations and had frequently consulted with judges and other lawyers regarding the trial of a capital case and took educational courses on that subject; (7) the decision of trial counsel not to introduce evidence that petitioner consumed some marijuana the day of the burglary/murder of one of the victims,

was based on sound tactical decision making. (People v. Jackson, supra, 28 Cal.3d 264, at pp. 294-296, 168 Cal.Rptr. at pp. 616-618, 618 P. 2d at pp. 162-164.)

It is therefore urged that petitioner was given effective representation as required under the Federal Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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